

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

In Re:

MEDTRONIC, INC.  
SPRINT FIDELIS LEADS  
PRODUCTS LIABILITY LITIGATION

Multidistrict Litigation

No. 08-1905 (RHK/JSM)

**JOINT REPORT FOR SEPTEMBER  
24, 2008 STATUS CONFERENCE  
PURSUANT TO ORDER NO. 4**

Pursuant to Pretrial Order No. 4, counsel for the Plaintiffs and Medtronic, Inc., Medtronic International Technology, Inc. (f/k/a Medtronic Puerto Rico, Inc.), Medtronic USA, Inc., and Medtronic Puerto Rico Operations Co. (collectively, “Medtronic”) submit this joint status report and agenda for the upcoming status conference on September 24, 2008, at 10:00 a.m.

**1. Summary of Activities Since Last Conference.**

Since the last status conference before this Court on August 27, 2008, counsel have continued to work to resolve outstanding issues. We reached agreement on the “complaint by adoption” form and the Court entered an order on that form on September 17, 2008. We are continuing to discuss ESI and Preservation order issues. As to ESI, through the course of several meet and confer sessions, the parties agree that there are no issues that need to be addressed with the Court at this time. By stipulation filed on September 11, 2008, the parties also agreed to conduct two additional Demonstration Days and have met and conferred regarding destructive analysis and testing of leads.

With respect to “multiple party” complaints and the “*American Pipe*” tolling issue, the parties further conferred pursuant to the Court’s directive but were unable to reach agreement despite having several productive but ultimately unsuccessful discussions. On September 15, the

parties tendered to the Court their respective proposed orders concerning joinder and tolling and below offer brief additional comments on those proposals.

On August 4, 2008, Defendants filed their motions to dismiss the Master Complaints for Individuals, Third Party Payors and Medicare Secondary Payors. The Plaintiffs must respond by September 18, 2008. Defendants' Reply briefs are due October 20, 2008 and the hearing is currently set for October 30, 2008 at 9:30 a.m. It may be useful for the Court to provide some guidance to the parties with regard to the amount of time the Court would like to allocate to the oral arguments on the motions to dismiss.

Attached hereto for the Court's convenience is an updated list of related pending cases not yet transferred and pending state court cases.

## **2. Proposed Agenda.**

Counsel agree on the following proposed agenda for the September 24, 2008 status conference:

**A. Tolling Agreement/Tolling Order.** The parties still cannot agree on the application of the *Amercian Pipe* doctrine. They set forth their respective positions in the previous Joint Status Report and offer additional comments on the proposed orders tendered on September 15 below.

**C. Multiple Parties Order.** The parties cannot agree on the appropriateness and terms of an order permitting the filing of multiple party complaints. The parties previously set forth their respective positions, but offer additional comments on the proposed orders below.

**D. Preservation Order/Testing of Fidelis Leads.** As noted above, the parties are currently in discussions concerning this topic and will submit a proposed order or advise the Court if any issues need to be resolved by the Court.

**E. State Court Liaison.** The status of this issue has not changed. The parties agree that no Court action is required at this time.

**3. Parties' Positions on Disputed Items.** The two items remaining from the last status hearing agenda are: (1) the *American Pipe* doctrine issue and (2) the Multiple Party Complaint issue. The parties' positions were set out in the prior Joint Status Report, but set forth below are additional comments generated by the proposed orders submitted to the Court on September 15, 2008.

**A. *American Pipe* Doctrine.**

**Plaintiffs' Position.**

As Plaintiffs stated in the previous submission to the Court on this issue, Plaintiffs believe that tolling is appropriate under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), and without repeating our prior legal arguments that support this issuance of a tolling order here, Plaintiffs assert that there simply is no prejudice to Medtronic by the entrance of such an order. The tolling order submitted by the Plaintiffs on September 15, 2008, applies only to those cases that have been pending in or subsequently filed in the District of Minnesota and it specifically states that it does not release any statute of limitations defense which could have been asserted prior to the date of the Order.

The Tenth Circuit recently recognized the holding in *American Pipe* that “[t]he commencement of the original class suit” tolls the running of the statutes of limitations “for all purported members of the class” until after the denial of the class certification motion ....” *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, \_\_\_\_\_ F.3d \_\_\_\_\_, No. 07-1241, 2008 WL 4183339 at \*4 (10th Cir. Sept. 12, 2008) (*citing American Pipe*, 414 U.S. at 553). The Tenth Circuit also recognized the efficiencies of this rule.

“Pragmatically, the Court also concluded that a tolling rule was necessary to advance the goals of Rule 23, namely ‘the efficiency and economy of litigation.’ ... If not for a tolling doctrine, individuals would feel compelled to file placeholder lawsuits prior to the expiration of the statute of limitations, thereby clogging the channels of the court with suits already encompassed by the class action....The tolling doctrine clears that clutter by sidelining lawsuits that might have been filed merely to preserve the option of later, individual intervention.”

*Id.* at \* 5 (citing *American Pipe*, 414 U.S. at 551 – 554). This is precisely the reason that Plaintiffs assert that a tolling agreement should be put into place in this case until the resolution of class certification motions. As such, not only is it Plaintiffs’ position that a tolling agreement is appropriate under *American Pipe* but it also assists the Court in eliminating these “placeholder” lawsuits that will unnecessarily clog the court system. Plaintiffs request that the Court enter the proposed Order submitted by Plaintiffs on September 15, 2008.

#### **Defendants’ Position.**

As noted before, Medtronic objects to the entry of any general order to the effect that the *American Pipe* doctrine tolls all statute of limitations periods for all subsequently filed cases for unspecified claims by putative class members. Plaintiffs’ proposed order does not overcome the inherent problems previously identified by Medtronic. Namely, plaintiffs’ proposed order assumes that the *American Pipe* tolling doctrine is properly applied in this case, but that is not a foregone conclusion as other courts have noted, and certainly not one that should be reached in the abstract without the benefit of addressing, if necessary, disputes over tolling in individual cases. Even if *American Pipe* tolling applies, it does not automatically lead to tolling of all claims as plaintiffs’ proposed order would suggest, but only tolls those claims that meet the standards set forth in *American Pipe* and its progeny – and here it cannot be said in the personal injury context that having notice of some claims is sufficient notice to mount a defense of all claims (including those of unknown persons) where individual circumstances and defenses can

and do vary considerably. Thus, plaintiffs simply ask the Court to enter an order that would have the effect of imposing a tolling agreement of uncertain duration under the guise of applying *American Pipe* tolling.

Nothing in the Supreme Court or Eighth Circuit precedent or in the precedent available from other MDLs – plaintiffs cite no comparable orders -- supports entry of such an order here. Indeed, the recent Tenth Circuit decision cited by plaintiffs above reinforces Medtronic’s arguments – again the decision there is the result of the analysis of tolling principles after application of state law in the context of a dispute over an individual case. Moreover, the case sheds no light on the propriety of *American Pipe* in the context of a personal injury or mass tort actions because *Boellstorff* involved alleged breach of contract and insurance regulatory violations under Colorado law. Plaintiffs’ concern about the possible increase in complaint filings or lack of certainty among potential plaintiffs as to the application of tolling or limitations periods is not sufficient reason to enter such an order. Indeed, because the MDL process results in transfer of cases to this Court for coordinated pretrial proceedings, the inefficiencies and potential for duplication that is one rationale for *American Pipe* tolling simply do not exist. Thus, for all of these reasons and those stated in the prior Joint Status Report, Medtronic asks the Court to decline to enter the plaintiffs’ proposed tolling order.

## **B. Multiple Party Complaints.**

### **Plaintiffs’ Position.**

This is simply an issue of efficiency for the Court. The Order for Consolidation Filing that Plaintiffs submitted on September 15, 2008 allows certain Plaintiffs to join together on a single complaint without unnecessary motion practice. Medtronic suffers no prejudice by the entrance of this Order because Plaintiffs’ proposed Order preserves “any defenses, arguments or

positions by Medtronic; including, specifically, Medtronic's position that the claims of each individual plaintiff shall be tried separate and apart from all other plaintiffs joined in the multiple plaintiff action."

Under Rule 20, Plaintiffs can, in good faith, "bundle" their cases without such an Order. However, the obvious result will be endless motion practice by this Court to determine whether or not the bundling was appropriate. Plaintiffs assert that the language from their proposed Order, which states "Multiple plaintiffs may initiate an action in this MDL in one complaint so long as the plaintiffs are residents of the same state and allege the same claims under that state's laws" and which is the identical language that the Court adopted in *In re Medtronic Inc. Implantable Defibrillators Prod. Liability Litig.*, MDL 05-1726 (JMR/AJB), satisfies Rule 20, and provides for a method of streamlining the filing in this litigation. As such, Plaintiffs request that the Court enter the proposed Order Re Consolidated Filings by Plaintiffs submitted to the Court on September 15, 2008.

**Defendants' Position:**

Medtronic requests that the Court decline requests for leave to amend to add multiple unrelated plaintiffs (See Docket No.139 in *Colon-Perez* and Letter Request in *Aderman*)<sup>1</sup> and decline the PSC's request to enter a general order permitting the bundling of multiple unrelated plaintiffs resident in the same state, all of which would be contrary to the standards established by Rule 20. For its part, Medtronic proposes that the Court enter an order allowing joinder where the plaintiffs to be joined received care or treatment from the same healthcare provider or facility concerning their Fidelis leads. Medtronic maintains that state-wide plaintiff bundling is

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<sup>1</sup> At a prior status conference, the Court indicated receipt of a letter request to file an amended complaint in *Aderman* naming many additional plaintiffs in a complaint already naming multiple unrelated plaintiffs. To date, Counsel for Medtronic have not received a copy of the letter request or any formal motion (and none appears on the docket).

not consistent with Rule 20. As to the burden and cost arguments made by plaintiffs, any cost burden is properly borne by plaintiffs as the plaintiffs should not be able to avoid through bundling of plaintiffs the costs set by the Courts to reflect the administrative burdens of handling complaint filings. Moreover, the burden and expense of filing complaints is substantially reduced in this MDL as result of the entry of the Complaint by Adoption form order and Medtronic's agreement, memorialized in Order No. 7, to accept service of complaints via electronic service on counsel. Accordingly, Medtronic requests that Court enter its proposed order as submitted on September 15 and decline to enter the plaintiffs' proposed order on joinder.

Dated: September 18, 2008.

For Plaintiffs' Counsel:	For Defendants' Counsel:
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